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IN THE

Supreme Court of the United States

MIGUEL ANGEL PEÑA-RODRIGUEZ,
Petitioner,

vs.

STATE OF COLORADO,
Respondent.

On Writ of Certiorari to the Supreme Court of Colorado

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Colorado Supreme Court properly held that the exclusion of juror testimony alleging racial bias during deliberations pursuant to Rule 606(b) of the Colorado Rules of Evidence is consistent with a defendant's right to an impartial jury.

2. Whether the Sixth Amendment compels an implicit exception to the no-impeachment rule for evidence of racially biased statements, but not for evidence of other types of prejudice.

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, the defendant is attempting to use his Sixth Amendment right to an impartial jury as a sword

1. Both parties have filed blanket consents to *amicus* briefs.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

to slice open the firmly established rule that jurors may not testify as to statements made during deliberations if such testimony is used to challenge the validity of the verdict. Furthermore, reversing the conviction would force the two young victims to again testify as to the sexual assault they both endured. The use of the Sixth Amendment in this manner is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

In May 2007, two teenage sisters were approached by a man in a bathroom of a horse-racing facility where Petitioner Miguel Peña-Rodriguez worked. *Peña-Rodriguez* v. *People*, 350 P. 3d 287, 288 (Colo. 2015) (en banc). While in the bathroom, the man asked the sisters if they wanted to "party." Respondent's Brief in Opposition to Petition for Writ of Certiorari ("Opp.") 3. When the sisters refused, the man turned the bathroom light off, leaving the room dark. *Ibid.* As the sisters attempted to leave the dark bathroom, the man grabbed at the girls—one on the shoulder, then the breast, the other on the shoulder, then the buttocks. *Ibid.* After a struggle, the sisters escaped and told their father, also a race track employee, what had happened in the bathroom. *Id.*, at 4. The police were notified. *Ibid.*

Later that night, the teenage sisters identified Petitioner as the man who assaulted them. Opp., at 4. Petitioner was subsequently charged with one count of attempted sexual assault on a child (felony), one count of unlawful sexual contact (misdemeanor), and two counts of harassment (misdemeanors). *Ibid.*

During *voir dire*, the venire received a written questionnaire that included several questions regarding each juror's ability to render a verdict based on the evidence presented at trial. *Peña-Rodriguez*, 350 P. 3d,

at 288. Prior to *voir dire*, defense counsel was advised by the judge that "in the past, some of our jurors have been vocal in their dislike of people who aren't in the country legally. So I don't know if that's an issue for you or your client, but you may want to address it." Opp. 4-5. Defense counsel chose not to mention race or immigration status, nor ask any questions about the venire's experiences or views on race. *Id.*, at 5. Further, none of the empaneled juror's *voir dire* responses reflected a propensity towards racial bias. *Peña-Rodriguez*, 350 P 3d, at 288.

The empaneled jury deliberated for a "somewhat lengthy" period of time. Brief for Petitioner 6. The jury reported to the judge that they were unable to reach a unanimous decision on any of the charges. *Ibid.* The judge admonished them to keep deliberating to try and reach unanimity. *Ibid.*

After deliberating for a total of 12 hours, the jury found Petitioner guilty of the three misdemeanor counts of unlawful sexual contact and harassment, but they were unable to reach a verdict on the felony charge of attempted sexual assault on a child. *Id.*, at 7.

After trial, two jurors (M.M. and L.T.) spoke with defense counsel alleging that a fellow juror (H.C.) had made racially biased statements about Petitioner and Mexican men in general during deliberations. *Peña-Rodriguez*, 350 P 3d, at 288-289. The trial court subsequently granted Petitioner's motion for juror contact information. *Ibid.* Petitioner then moved for a new trial submitting affidavits from jurors M.M. and L.T. *Id.*, at 289. According to M.M. and L.T., H.C. said "I think he did it because he's Mexican and Mexican men take whatever they want." *Ibid.* The two jurors also stated that juror H.C. "made other statements concerning Mexican men being physically controlling of women because they have a sense of entitlement and

think they can 'do whatever they want with women.' " *Ibid.* Also, H.C. "believed that [Petitioner] was guilty because in his experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." *Ibid.* In addition, L.T. contended that H.C. "said that where he used to patrol, nine times out of ten Mexican men were guilty of being aggressive toward women and young girls" and "he did not think the alibi witness was credible because, among other things, he was 'an illegal.' " *Ibid.*

The trial court denied the motion, finding that Colorado Rule of Evidence 606(b) barred any inquiry into juror deliberations. *Peña-Rodriguez*, 350 P 3d, at 289.

Petitioner appealed and a divided Court of Appeals affirmed. *Ibid.* The Colorado Supreme Court also affirmed, by a 4-3 vote. *Id.*, at 293.

SUMMARY OF ARGUMENT

The right to an impartial jury of one's peers is guaranteed by the Sixth Amendment. Preserving and protecting the secrecy of jury deliberations is regarded as sacrosanct. Both of these principles have deep historical roots and both are of upmost importance.

Rule 606(b) prohibits the use of post-verdict juror testimony to inquire into the validity of a verdict. Congress's broad codification of the no-impeachment rule precludes testimony of biased statements made during jury deliberations. Allegations of racial bias by a juror do not fall within any of the three enumerated exceptions and the Sixth Amendment does not create a fourth implicit exception for such allegations. Preserving the confidentiality of jury deliberations is funda-

mental to the uninhibited and forthright discussion that must occur within the jury room when deciding a peer's fate.

Tanner v. *United States* and *Warger* v. *Shauers* addressed the constitutional interplay between jury impartiality versus jury secrecy, and in both cases this Court held that jury secrecy prevails. *Tanner* held that a defendant's Sixth Amendment rights are adequately protected by several aspects of the trial process. *Tanner*'s "sources of protection" apply in this case with equal force. Allowing litigants to peek into the jury deliberation room under the guise of determining whether racial bias played a role in the decision-making process is contrary to Congressional intent and this Court's precedent. The consequences of abandoning the protections given to secret jury deliberations are too great.

ARGUMENT

I. Preserving the secrecy of jury deliberations is consistent with the right to a jury trial guaranteed by the Sixth Amendment.

The right to a trial by jury in all criminal prosecutions is guaranteed by the United States Constitution. U. S. Const., Art. III, § 2, cl. 3.[2] The Sixth Amendment, made applicable to the states by the Fourteenth Amendment, expands upon that right and guarantees to the criminally accused an impartial jury from the state and district where the crime was committed. U. S.

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2. "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed "

Const., Amdt. 6;[3] *Duncan* v. *Louisiana*, 391 U. S. 145, 149 (1968).

Trial by jury has deep historical roots and has significantly evolved over hundreds of years. W. Forsyth, History of Trial by Jury 1-5 (2d ed. 1971). The English colonists brought trial by jury to America and declared it an " 'inherent and invaluable right of every British subject in these colonies.' " *Duncan*, 391 U. S., at 152 (quoting resolution of the Stamp Act Congress (1765)). The colonists were vehemently against "trials before judges dependent on the crown alone for their salaries." *Ibid.*; see also *Singer* v. *United States*, 380 U. S. 24, 29 (1965) (referring to the colonists' "increasing hostility to the Crown"). "Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689." *Duncan*, 391 U. S., at 151.

Trial by jury was well established by the time the Constitution and Bill of Rights were drafted and ratified. America's founding fathers included in those two documents the explicit right to a jury trial to "guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people." J. Story, Commentaries on the Constitution of the United States § 924, p. 657 (abridged ed. 1833, reprinted 1987).

The methods of protecting those underlying reasons are found in the Fifth and Sixth Amendments. The

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3. The Sixth Amendment provides, in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed[.]" U. S. Const., Amdt. 6.

Fifth Amendment guards against vindictive prosecution by requiring a grand jury to first convene and assess whether there is cause to prosecute. *Id.*, §§ 928-929, at 661-662. "They sit in *secret*, and examine the evidence laid before them *by themselves*." *Ibid.* (emphasis added). It is "long established policy" and well settled in this Court that grand juries operate in total secrecy. *United States* v. *Sells Engineering, Inc.*, 463 U. S. 418, 424-425 (1983); see also *United States* v. *Williams*, 504 U. S. 36, 48 (1992). "Both Congress and this Court have consistently stood ready to defend it against unwarranted intrusion." *Sells Engineering*, 463 U. S., at 425.

The right to an impartial jury of one's peers is guaranteed by the Sixth Amendment. Jury trials are fundamental to our criminal justice system, seeking to protect against arbitrary power and influence, and government oppression. *Duncan*, 391 U. S., at 153; *Thompson* v. *Utah*, 170 U. S. 343, 350 (1898), overruled on other grounds in *Collins* v. *Youngblood*, 497 U. S. 37, 51-52 (1990). The rule that demands secrecy of what that impartial jury discusses behind closed doors during deliberations predates the Sixth Amendment and can be traced to common law in the 1785 case of *Vaise* v. *Delaval*, 99 Eng. Rptr. 944 (K. B. 1785). In that case, the judge (Lord Mansfield), was informed that the jury had decided the case by drawing lots. *Warger* v. *Shauers*, 574 U. S. __, 135 S. Ct. 521, 526, 190 L. Ed. 2d 422, 428 (2014); see also *United States* v. *Benally*, 546 F. 3d 1230, 1233 (CA10 2008). "Mansfield's Rule" declared that the proffered juror affidavits detailing the alleged activity were inadmissible and instituted a blanket ban on jurors testifying against their own verdict. *Benally*, *supra*, at 1233. Over time, "Mansfield's Rule" found itself imbedded in this Court's constitutional jurisprudence. "By the beginning of this century, if not earlier, the near universal and firmly

established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a verdict." *Tanner* v. *United States*, 483 U. S. 107, 117 (1987).

State court decisions from the early nineteenth century reflect the acceptance of Mansfield's Rule.

> "I am opposed to penetrating into the recesses of a jury-room, through the instrumentality of jurors, who are kept together until they have agreed upon their verdict. The settled rule in New York and Virginia, as well as most modern English authorities, are adverse to the receiving of such testimony. [t]he testimony of jurors ought not be admitted to invalidate their verdicts." *Lessee of Cluggage* v. *Swan*, 4 Binn. 150, 158-159 (Pa. 1811).

> "The former practice, both in England and in this country, was to admit the testimony of jurors in regard to their own misbehaviour. But this practice was broken in upon by Lord Mansfield in *Vaise* v. *Delaval*, 1 T.R. 11, *and has ever since been holden to be improper and dangerous. The rule is now perfectly well settled in both countries and may be laid down to be, that the testimony of jurors is inadmissible to show their own misbehaviour*[.]" *Dorr* v. *Fenno*, 12 Pick. (29 Mass.) 521, 525 (1832) (emphasis added); see also *Dana* v. *Tucker*, 4 Johns. 487, 488 (1809) (*per curiam*).

Thus, Mansfield's Rule cannot be inconsistent with the right to a jury trial as embodied within the Sixth Amendment and made applicable to the states by the Fourteenth, because it was sweeping the country contemporaneously with the ratification of the Bill of Rights, and it was established law when the Fourteenth Amendment was adopted.

II. Rule 606(b) constitutionally precludes juror testimony relating to allegations of racial bias during deliberations.

Colorado Rule of Evidence 606(b)[4] and its federal counterpart Federal Rules of Evidence 606(b)[5] codify the common-law rule and bar the use of post-verdict juror testimony to inquire into the validity of a verdict. *Warger* v. *Shauers*, 574 U. S. __, 135 S. Ct. 521, 527, 190 L. Ed. 2d 422, 430 (2014). Among other reasons, jurors are prohibited from impeaching their own verdicts in order to "promot[e] the finality of verdicts and insulat[e] the jury from outside influences." *Id.*, 135 S. Ct., at 526, 190 L. Ed. 2d, at 428, citing *McDonald* v. *Pless*, 238 U. S. 264, 267-268 (1915).

As originally enacted, the only express exceptions to Rule 606(b) were for "extraneous information and outside influences." *Warger*, 135 S. Ct., at 527, 190 L. Ed. 2d, at 430. A third exception was added in 2006

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4. Colorado Rule of Evidence 606(b) provides: "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of a jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jurors' attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying."

5. Colorado recognizes that its no-impeachment rule is substantially similar to the federal rule and it looks to federal authority to guide its construction of the state rule. *Stewart ex rel. Stewart* v. *Rice*, 47 P. 3d 316, 321 (Colo. 2002).

for mistakes made when entering the verdict on the verdict form. *Id.*, 135 S. Ct., at 527, n. 2, 190 L. Ed. 2d, at 430, n. 2. "Rule 606(b) is a rule of evidence, but its role in the criminal justice process is substantive: it insulates the deliberations of the jury from subsequent second-guessing by the judiciary." *United States* v. *Benally*, 546 F 3d 1230, 1233 (CA10 2008).

In this case, two jurors offered testimony via affidavits that may show the verdict was affected by a fellow juror's racial bias. Thus,

> "[w]hen the affidavit of a juror, as to the misconduct of himself or the other members of the jury, is made the basis of a motion for a new trial, the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what happened in the jury room." *McDonald* v. *Pless*, 238 U. S. 264, 267 (1915).

Petitioner is seeking a new trial and the only evidence he has to offer in support of his motion are the two juror affidavits that contain statements allegedly made by a fellow juror *during* deliberations. These affidavits fall squarely within the parameters of Rule 606(b). The only reason they are being considered in this appeal is because of their allegations of racial bias. Their admission is prohibited unless the Sixth Amendment requires another exception in addition to those in the text of the rule.

A. Rule 606(b) Versus the Sixth Amendment.

This Court addressed the interplay between Rule 606(b) and the Sixth Amendment in both *Tanner* and *Warger*. In *Tanner* v. *United States*, 483 U. S. 107, 113 (1987), the defendants filed a motion seeking permission to interview the jurors, an evidentiary hearing and

a new trial after they were convicted, but before they were sentenced. The motion was based on a report of a juror that several jurors consumed drugs and alcohol during the trial causing them to sleep through the afternoons. *Ibid.* The trial court concluded that any juror testimony about juror intoxication was inadmissible under Rule 606(b). *Ibid.* However, the trial court allowed a hearing with non-juror witnesses, such as court personnel, so that they could testify as to their observations of the jury. *Ibid.*

After the hearing, the trial court denied the motion for a new trial. *Id.*, at 115. While an appeal was pending, defendants filed another motion for a new trial based on additional evidence from another juror alleging more detailed evidence of juror drug and alcohol use during the trial. *Id.*, at 115-116. The motion was again denied. *Id.*, at 116. The Eleventh Circuit affirmed and the issue before this Court was whether Rule 606(b) barred juror testimony of drug and alcohol use, and whether an evidentiary hearing that included such juror testimony was compelled by their Sixth Amendment right to a competent jury. *Id.*, at 116-117.

This Court canvassed the legislative history of Rule 606(b) and concluded it "demonstrates with uncommon clarity that Congress specifically understood, considered, and rejected a version of Rule 606(b) that would have allowed jurors to testify on juror conduct during deliberations." *Id.*, at 125. This Court further held that juror intoxication is not an "outside influence" about which jurors may testify to impeach their verdict, and the proposed juror testimony was barred by Rule 606(b).

This Court then addressed whether prohibiting jurors from testifying as to their conduct during deliberations violates a defendant's right to a fair trial before an impartial and competent jury. *Id.*, at 126. The

constitutional argument was rejected due to "long-recognized and very substantial concerns support[ing] the protection of jury deliberations from intrusive inquiry." *Id.*, at 127.

It was further held that a defendant's Sixth Amendment right to a mentally competent jury is protected by several aspects of the trial process:

> "The suitability of an individual for the responsibility of jury service, of course, is examined during *voir dire*. Moreover, during the trial the jury is observable by the court, by counsel, and by court personnel. [Citation.] Moreover, jurors are observable by each other, and may report inappropriate juror behavior to the court *before* they render a verdict. [Citation.] Finally, after the trial a party may seek to impeach the verdict by nonjuror evidence of misconduct." *Ibid.* (emphasis in original).

Even though *Tanner* involved juror competency, rather than impartiality, these "sources of protection" apply in this case with equal force. Here, the judge cautioned the defense about the possibility of the jurors' "dislike of people who aren't in the country legally." Opp. 4-5. The judge advised the defense that they "may want to address the possibility of bias." *Ibid.* "[*V*]*oir dire* can be an essential means of protecting" a defendant's right to an impartial jury *Warger*, 135 S. Ct., at 528-529, 190 L. Ed. 2d, at 431.

In this case, the defense chose not to mention race or immigration status, nor ask the venire about their views on race, despite an invitation from the judge to do so. "*Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." *Rosales-Lopez* v. *United States*, 451 U. S. 182, 188 (1981) (plurality opinion).

> "A trial represents an important investment of private and social resources, and it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process because counsel lacked an item of information which objectively he should have obtained from a juror on *voir dire* examination." *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U. S. 548, 555 (1984).

If counsel's choice was ineffective assistance, there is a remedy. If not, the defense should not be allowed to roll the dice and then complain about a problem it could have prevented.

In addition, jurors M.M. and L.T. could have reported juror H.C.'s racially biased comments made during deliberations *before* a verdict was reached. This is especially true considering that the jury was initially unable to reach a verdict on any of the charges. The jury informed the judge they were unable to reach a verdict. Brief for Petitioner 6. The judge then admonished the jury to continue deliberating and attempt to reach unanimity. *Ibid.*

According to Petitioner, the trial court informed the jurors that it was their duty "to consult with one another and to deliberate with a view of reaching a verdict." *Ibid.* When the judge was informed of the jury's inability to agree, any one of the jurors could have told the judge about the racial comments made by juror H.C. The judge could have investigated the allegations and made a decision as to whether juror H.C. should be excused.

"Due Process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable." *Smith* v. *Phillips*, 455 U. S. 209, 217 (1982). It is the responsibility of the trial

judge to be "ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences *when* they happen." *Ibid.* (emphasis added). The trial judge holds the keys, and it is within his or her control to determine if prejudice is seeping in. If the judge is informed during the trial or deliberations of juror misconduct, he or she has the option to declare a mistrial, or that juror can be dismissed and replaced with an alternate, or in some jurisdictions the parties can stipulate to a jury of less than 12. Gershman, Contaminating the Verdict: The Problem of Juror Misconduct, 50 S. D. L. Rev. 322, 339 (2005).

More recently, in *Warger* v. *Shauers*, *supra*, this Court had another opportunity to examine the constitutional concerns raised by Rule 606(b). This Court unanimously held that Rule 606(b) precludes a party from introducing juror testimony in a proceeding in which that party is seeking a new trial based on evidence that a juror lied during *voir dire*. 135 S. Ct., at 528, 190 L. Ed. 2d, at 431.

Warger is a civil case in which Petitioner Warger's motorcycle was struck from behind by Respondent Shauers' truck. *Id.*, 135 S. Ct., at 524, 190 L. Ed. 2d, at 427. Warger suffered extensive injuries and sued Shauers for negligence in Federal District Court. *Ibid.* Lengthy *voir dire* was conducted and none of the jurors responded affirmatively to the question of whether they could *not* be a fair and impartial juror on the type of case before them. *Ibid.* The trial commenced and the jury returned a verdict in favor of Shauers. *Ibid.* After the case was over, one of the jurors contacted Warger's attorney and stated that another juror commented during deliberations that her daughter had been at fault in a car accident in which a man had died. *Ibid.* The juror expanded further, allegedly saying that it

would have ruined her daughter's life if she had been sued. *Ibid.*

Warger moved for a new trial on the ground that a juror had deliberately lied during *voir dire* about her ability to be impartial. *Ibid.* The District Court denied the motion because the only evidence supporting Warger's claim were comments made during deliberations and they were barred by Rule 606(b). *Id*, 135 S. Ct., at 525, 190 L. Ed. 2d, at 427. The Eighth Circuit affirmed, and this Court granted certiorari and also affirmed. See *id.*, 135 S. Ct., at 525, 190 L. Ed. 2d, at 428.

This Court examined the historical evolution of Rule 606(b) from common law through its codification by Congress. *Id.*, 135 S. Ct., at 525-527, 190 L. Ed. 2d, at 428-430. It is important to note that early on, many courts, including this Court, interpreted Mansfield's Rule differently—some courts applied it narrowly and others applied it more broadly. *Id.*, 135 S. Ct., at 526, 190 L. Ed. 2d, at 428-429. Under the narrow approach, also known as the "Iowa Rule," juror testimony was excluded only if it "consisted of evidence of the jurors' subjective intentions and thought process in reaching a verdict." *Id.*, 135 S. Ct., at 526, 190 L. Ed. 2d, at 428. Thus, courts adhering to this narrow view allowed testimony of jury deliberations when used to challenge juror conduct during *voir dire*. *Id.*, 135 S. Ct., at 526, 190 L. Ed. 2d, at 429. In the present case, the juror was speaking of his own thought process, and the evidence would have been excludable even under the narrow view of the rule.

Under the broader approach, also known as the "federal approach," all evidence of jury deliberations was inadmissible unless used to prove an "extraneous matter" influenced the jury. *Ibid.* Courts adhering to this broader view did not allow testimony of jury

deliberations to demonstrate dishonestly during *voir dire*. *Ibid.*

In *Warger*, this Court made clear that it had rejected the Iowa approach in both *McDonald* v. *Pless*, 238 U. S. 264 (1915), and in *Clark* v. *United States*, 289 U. S. 1 (1933). See 135 S. Ct., at 527, 190 L. Ed. 2d, at 429-430. Congress's subsequent enactment of Rule 606(b) encompassed this Court's broader view of the no-impeachment rule. *Id.*, 135 S. Ct., at 527, 190 L. Ed. 2d, at 430.

> "For those who consider legislative history relevant, here it confirms that this choice of language was no accident. Congress rejected a prior version of the Rule that, in accordance with the Iowa approach, would have prohibited juror testimony only as to the 'effect of anything upon [any] juror's mind or emotions or concerning his mental processes' [Citation.] Thus Congress 'specifically understood, considered, and rejected a version of Rule 606(b)' that would have likely permitted the introduction of evidence of deliberations to show dishonesty during *voir dire*." *Ibid.*; see also *Benally*, 546 F. 3d, at 1238-1239.

Warger holds that Congress's broad codification of the no-impeachment rule precludes biased statements made during jury deliberations to prove a juror lied during *voir dire*. If those biased statements cannot be introduced to prove a juror lied during *voir dire*, thus precluding any questioning about a juror's impartiality when rendering a verdict, it follows that a juror's biased statements made during deliberations also cannot be introduced in a motion for a new trial unless the statement falls into express exception to the Rule.

B. Sufficiency of Tanner Safeguards.

Rule 606(b) has three enumerated exceptions: (1) whether extraneous prejudicial information was improperly brought to the jurors' attention (*i.e.*, newspaper article or television newscast), (2) whether any outside influence was improperly brought to bear upon a juror (*i.e.*, attempted bribe or threat to juror's safety), or (3) whether there was a mistake in entering the verdict onto the verdict form. Racially biased comments do not fall into the scope of any of these three exceptions. See *Benally*, 546 F. 3d, at 1237-1238. Nor did Congress create a fourth exception for alleged racially biased statements or comments made during deliberations. Creating an implicit exception for alleged racially biased statements is the type of subjective second-guessing by the judiciary that this Court sought to avoid and would contravene explicit Congressional intent. *Id.*, at 1239.

> "[A] court in a particular case is not the proper forum for making or enlarging exceptions to the rules of evidence. Our commission is to apply the Rules of Evidence as written and interpreted to the case at hand. Perhaps it would be a good idea to amend Rule 606(b) to allow testimony revealing racial bias in jury deliberations, but the body entrusted with making the Rules is Congress[.]" *Id.*, at 1238.

It is important to note that in *Warger*, this Court stated in a footnote that "[t]here may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged. If and when such a case arises, the Court can consider whether the usual safeguards are or are not sufficient to protect the integrity of the process. We need not consider the question, however, for those facts are not presented here." *Id.*, 135 S. Ct., at 529, n. 3, 190 L. Ed. 2d, at 432, n. 3. A juror's bias

may be actual or implied as a matter of law. *United States* v. *Wood*, 299 U. S. 123, 133 (1936).

This is not a case of extreme juror bias that justifies a need to revisit the *Tanner* safeguards. An extreme case might be, for example, a jury deliberation infected with racial hatred so deep that the jury would convict without evidence or on clearly insufficient evidence. Juror H.C.'s stereotypical beliefs do not rise to that level. The only evidence presented by the defense in this case are affidavits from two jurors that allege racially biased comments were made by one other juror during deliberations. There is no evidence to show that the racially biased comments persuaded all 12 jurors to vote guilty. There is no evidence to show that the two complaining jurors were strong-armed into voting guilty by juror H.C.'s racially biased statements. There is no evidence to prove that juror H.C. is a racist, or that he based his guilty vote solely on racial prejudices and not on the evidence presented. Furthermore, the guilty verdicts on all three misdemeanor counts were unanimous, which means jurors M.M. and L.T. concurred in the decision to find Petitioner guilty beyond a reasonable doubt. See *Benally*, 546 F 3d, at 1241.

The *Tanner* safeguards apply in cases like this one and equally seek to protect a defendant's right to an impartial jury.

> "Voir dire can still uncover racial predilections, especially when backed up by the threat of contempt or perjury prosecutions. Jurors can report to the judge during trial if racist remarks intrude on jury deliberations, enabling the judge to declare a mistrial or take other corrective measures. After the verdict is rendered, it could still be impeached if there is evidence of juror wrongdoing that does not depend on the testimony of fellow jurors in breach of Rule 606(b) confidentiality. And even trial

observation could uncover racist attitudes if a juror openly wore his feelings on his sleeve. These protections might not be sufficient to eliminate every partial juror, just as in *Tanner* they proved insufficient to catch every intoxicated juror, but jury perfection is an untenable goal." *Id.*, at 1240.

C. Court of Appeals Cases.

The issue of introducing racially biased comments made during deliberations has been at issue in several Federal Court of Appeals cases. The First and Seventh Circuits agree that juror testimony concerning alleged racially biased statements is deemed incompetent under Rule 606(b) and stressed the importance of the policies embodied within the Rule. See *United States* v. *Villar*, 586 F 3d 76, 83-84 (CA1 2009); see also *Shillcutt* v. *Gagnon*, 827 F. 2d 1155, 1158-1159 (CA7 1987). Despite that acknowledgment, the Seventh Circuit nonetheless declared that the Rule could not be applied where racial prejudice "pervaded the jury room" and thus affected the outcome of the verdict. *Shillcutt*, 827 F 2d, at 1159. The First Circuit found a constitutional exception for "rare and grave cases" that "implicate a defendant's rights to due process and an impartial jury." *Villar*, 586 F. 3d, at 87. Both Circuit Courts went beyond the intended dictates of the Rule and essentially created their own exception to Rule 606(b) for allegations of racial bias during deliberations.

In *United States* v. *Henley*, 238 F. 3d 1111, 1121 (CA9 2001), a Ninth Circuit case decided before *Warger*, one of the issues was whether Rule 606(b) precludes the admission of racially biased statements made by a juror outside the deliberation room when offered to show a juror lied during *voir dire*. The court held that the Rule does not preclude its admission. *Ibid.*, citing *Hard* v. *Burlington Northern R.R.*, 812 F. 2d 482 (CA9 1987).

Because *Henley* was decided prior to *Warger* and reached an opposite result on similar facts, it has little or no authority as precedent. Even though it was not at issue, the court further stated in dicta that "a powerful case can be made that Rule 606(b) is wholly inapplicable to racial bias" because racial bias is "plainly a mental bias" unrelated to the issues that a jury may legitimately be called upon to determine in a criminal case. *Henley*, 238 F. 3d, at 1120.

The Third Circuit also addressed whether racially biased statements allegedly made by jurors during deliberations could be introduced to challenge a juror's honesty during *voir dire* in a state-prisoner habeas corpus case, *Williams* v. *Price*, 343 F. 3d 223 (CA3 2003) (Alito, J.). The Third Circuit refused to follow the Ninth Circuit's lead, stating its precedent appears to be "inconsistent with" Rule 606(b). *Id.*, at 236, n. 5. Rather, the court found that "*Tanner* implies that the Constitution does not require the admission of evidence that falls within Rule 606(b)'s prohibition." *Id.*, at 235. Applying the federal habeas corpus standard for claims rejected on the merits by the state courts, the court held that no Supreme Court decision "clearly establishes that it is unconstitutional for a state to apply a 'no impeachment' rule that does not contain an exception for juror testimony about racial bias on the part of jurors." *Id.*, at 239.

Perhaps the most instructive Court of Appeals case on this issue, and the best articulated analysis as to why Rule 606(b) constitutionally precludes juror testimony of racial bias, is the Tenth Circuit's decision in *Benally*. The facts are somewhat analogous to this case. Mr. Benally, a member of the Ute Mountain Ute Tribe, was charged with and found guilty of assault. 546 F. 3d, at 1231. During *voir dire*, the venire was asked several questions about their views on Native Americans. *Ibid.*

No jurors responded in a manner that would indicate potential bias. *Ibid.*

The day after the jury announced its verdict, one juror approached defense counsel and claimed that the jury deliberation had been improperly influenced by biased claims about Native Americans. *Ibid.* Armed with two affidavits of alleged racial bias by jurors, Benally moved to vacate the verdict and receive a new trial on the basis that the jurors lied during *voir dire* about their racial bias towards Native Americans. *Id.*, at 1232. The Tenth Circuit held that Rule 606(b) prohibits juror testimony of racial bias in jury deliberations and there is no Sixth Amendment exception. *Id.*, at 1231.

The *Benally* court discussed the history and purpose of Rule 606(b) and the policies it seeks to protect—namely, the finality of verdicts, protection against juror harassment, it reduces the incentive for jury tampering, it promotes free and frank discussion, and it protects the community's trust in the jury system. *Id.*, at 1234.

With those policy reasons in mind, the court examined the Ninth and Third Circuits' assessment of the issue. The court rejected the Ninth Circuit's interpretation, which permitted juror testimony to show deceit during *voir dire*, even when the improper *voir dire* was the basis for a new trial. *Id.*, at 1235-1236. Instead it followed the Third Circuit's approach and held that "allowing juror testimony through the backdoor of a voir dire challenge risks swallowing the rule." *Id.*, at 1236.

The *Benally* court then refused to create an implicit exception to the Rule for evidence of racial bias stating that "courts no longer have common law authority to fashion and refashion rules of evidence as the justice of

the case seems to demand, but must enforce the rules as enacted." *Id.*, at 1239.

Lastly, the *Benally* court addressed the argument that Rule 606(b) was unconstitutional as applied to the defendant. *Id.*, at 1239-1241. The court discussed *Tanner* at length and held that the standards enunciated in that case protects a defendant's Sixth Amendment right without "breaching the ban on post-verdict juror testimony " *Id.*, at 1240.

> "It may well be true that racial prejudice is an especially odious, and especially common, form of Sixth Amendment violation. But once it is held that the rules of evidence must be subordinated to the need to admit evidence of Sixth Amendment violations, we do not see how the courts could stop at the 'most serious' such violations.
>
> Nor does there seem to be a principled reason to limit the exception only to claims of bias, when other types of jury misconduct undermine a fair trial as well. If a jury does not follow the jury instructions, or ignores relevant evidence, or flips a coin, or falls asleep, then surely that defendant's right to a fair trial would be aggrieved " *Id.*, at 1241.

The broad codification of Mansfield's Rule enacted by Congress and copied by Colorado precludes jurors from testifying about anything discussed during deliberations unless it falls into an express exception to Rule 606(b). The facts of this case do not. Congress did not enact a fourth exception for allegations of racial bias, and it would be improper for this Court to create an exception that is in direct contravention of express legislative intent. If this Court opens the door to allow allegations of racial bias during deliberations, where would the exception end? It would permit endless future litigation over other types of discriminatory bias,

such as gender, religion, age, disability, and sexual orientation to name a few. "[I]f every claim that, if factually supported, would be sufficient to demand a new trial warrants an exception to Rule 606(b), there would be nothing left of the Rule, and the great benefit of protecting jury decision-making from judicial review would be lost." *Ibid.*

III. Preserving the confidentiality of jury deliberations is fundamental to the uninhibited and forthright discussion that must occur for a jury to wholly focus on reaching the right result.

Protecting the sanctity and secrecy of private jury deliberations is not a new precept. "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." *Clark* v. *United States*, 289 U. S. 1, 13 (1933). Furthermore, it is a violation of federal law for anyone who is not empaneled as a juror to knowingly or willingly record, attempt to record, listen to or observe, or attempt to listen to or observe, grand or petit jury proceedings. See 18 U. S. C. § 1508.

Jurors can be unpredictable and at times haphazard. A carefully selected group of 12 men and women step into the jury box with very little in common. Once they retire to the jury room to deliberate, that group of 12 now have the duty to come together as a harmonious whole with justice as their goal. They are the epitome of democracy in action. American jurors come from all walks of life—from the highly educated to the illiterate, wealthy to middle class to barely scraping by, copious note-takers who intently listen to every word spoken to

those day-dreaming throughout the proceedings about their upcoming vacation.

Jury members reflect different opinions, different backgrounds, different biases, different religions, different races, different political affiliations, and different educational backgrounds. The American jury system works well because of these differences. Jurors may use their own common sense and real world experience to decide if one version of the events is more plausible than the other and must be freely able to explain to their fellow jurors why a witness was or was not credible. They must also be able to give their opinions without constraint about the character of the involved parties.

The jury room is a place for open discussion and debate. Private jury deliberations allow a jury to focus on reaching the right result. If jurors knew their deliberations were to be made public or inquired into, their focus may switch from the right result to the result that may be the most amenable to public opinion. "[F]ull and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of post-verdict scrutiny of juror conduct." *Tanner* v. *United States*, 483 U. S. 107, 120-121 (1987). Furthermore,

> "[o]ne prominent commentator has concluded that '[g]enerally, it seems better to draw [the line] in favor of juror privacy; in the heat of juror debate all kinds of statements may be made which have little effect on outcome, though taken out of context they seem damning and absurd.' " *Smith* v. *Brewer*, 444 F. Supp. 482, 490 (SD Iowa 1978) (quoting 3 J. Weinstein & M. Berger, Weinstein's Evidence 606-636 (1976)).

The jury system is admittedly far from perfect. A criminal defendant is entitled to a fair trial, not a perfect one. *Delaware* v. *Van Arsdall*, 475 U. S. 673, 681 (1986).

> "There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process." *Tanner*, 483 U. S., at 120.

The founders of our country strongly desired to give criminal defendants the right to a jury of their peers. Because of this right, ordinary citizens have a duty to participate in court proceedings to decide the fate of fellow citizens faced with criminal charges. It is unlikely that all 12 jurors will all agree on every point at the outset of deliberations. There may be a couple of jurors who view the facts and evidence differently from their fellow jurors. The jurors must be able to candidly discuss these differences of opinion. A jury of ordinary citizens cannot be expected to do the right thing if they fear their discussions will become the centerpiece of a post-verdict attack.

A. Privileged Communications in Other Areas of the Law.

The policies that underlie several areas of privileged communication are analogous to the policies that prohibit jurors from testifying against their own verdicts. Both seek to promote uninhibited and forthright discussion of which secrecy and confidentiality are fundamental.

> "The privileges between priest and penitent, attorney and client, and physician and patient limit protection to private communications. These privileges are rooted in the imperative need for confidence and trust. The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return. The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out. Similarly, the physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment." *Trammel* v. *United States*, 445 U. S. 40, 51 (1980).

Deeply rooted in common law is the marital communication privilege. This privilege excludes as evidence the private communications between husband and wife made in the confidence of the marital relationship. *Ibid.* "The basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails." *Wolfle* v. *United States*, 291 U. S. 7, 14 (1934); see also *Stein* v. *Bowman*, 38 U. S. 209, 223 (1839) ("To break down or impair the great principles which protect the sanctities of husband and wife, would be to destroy the best solace of human existence").

Another analogous area in which this Court has recognized the need for a very broad privilege is the immunity given to members of Congress pursuant to

the Speech or Debate Clause of Article I, section 6, clause 1.[6]

> "The reason for the privilege is clear. It was well summarized by James Wilson, an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution. 'In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.'" *Tenney* v. *Brandhove*, 341 U. S. 367, 373 (1951) (quoting 2 Works of James Wilson 38 (Andrews ed. 1896)).

The Speech or Debate Clause affords members of Congress absolute immunity from lawsuit, an absolute testimonial privilege, and an absolute evidentiary privilege. See *Eastland* v. *United States Servicemen's Fund*, 421 U. S. 491, 501-503 (1979); see also *Dombrowski* v. *Eastland*, 387 U. S. 82, 85 (1967) (*per curiam*). "Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature." *United States* v. *Johnson*, 383 U. S. 169, 178 (1966). The Clause assures wide freedom of speech, debate, and deliberation to the legislative branch without intimidation from the executive and judicial branches. *Gravel*

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6. "The Senators and Representatives . . shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place." U. S. Const., Art. I, § 6, cl. 1.

v. *United States*, 408 U. S. 606, 616 (1972); see also *United States* v. *Helstoski*, 442 U. S. 477, 492 (1979).

Even though legislative acts are not done in private, nor are they intended to be secret, the policy behind the privilege is to allow members of Congress to debate freely and openly without fear of repercussion. In the jury deliberation context, juries should similarly be able to freely and openly deliberate without fear of their comments and opinions being scrutinized in public, or being subject to second-guessing or overruling by a judge.

When legislators are working in their legislative capacity, and jurors are working in their juror capacity, both should be able to discuss their thoughts, opinions, and ideas without restraint. Both are entitled to protection from questioning about the statements they made or actions taken while carrying out their duties. "[J]ury deliberations seem to conform perfectly with the utilitarian conception of privileged communications: they arise from a relationship of trust, and their confidentiality is preserved[.]" Note, Public Disclosures of Jury Deliberations, 96 Harv. L. Rev. 886, 900, n. 84 (1983).

The priest-penitent, attorney-client, physician-patient, husband-wife, and Congressional privileges are all entrenched in common law. Secret jury deliberations are also rooted in common law. These privileges serve similar purposes and are intended to encourage candid, direct, and unrestrained discussion. All of these rules of law sacrifice the completeness of evidence to serve an interest in confidentiality that society deems more important. Making these judgments is within the competence of the authorities vested with the power to make the rules of evidence.

B. Total Elimination of Bias Untenable.

Justitia, the Roman Goddess of Justice, also known as Lady Justice, sits in many courthouses and law schools around the world. Her presence is empowering—she stands tall, blindfolded, holding the scales of justice. Her blindfold represents "blind justice." Justice is to be meted out impartially and objectively without fear and regardless of wealth, status, race, gender, or identity.

Bias, of any kind, should never motivate a juror to convict or acquit a criminal defendant. Racial bias is deplorable and our judicial system has made great strides over the years in an attempt to eliminate racial bias in the jury selection process and during jury deliberations. See, *e.g.*, *Strauder* v. *West Virginia*, 100 U. S. 303, 310 (1880) (exclusion of blacks from juries by reason of their race violated Equal Protection Clause); *Batson* v. *Kentucky*, 476 U. S. 79 (1986) (peremptory challenge may not be used to exclude juror solely based on race); see also *Turner* v. *Murray*, 476 U. S. 28, 36-37 (1986) (capital defendant accused of an interracial crime entitled to have prospective jurors informed of victim's race and questioned on the issue of racial bias.) However, "[t]he difficulty springs from the fact that all adults have beliefs, values, and prejudices which make impartiality in the *tabula rasa* sense impossible." Gobert, In Search of the Impartial Jury, 79 J. Crim. L. & C. 269, 271 (1988).

"Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." *United States* v. *Wood*, 299 U. S. 123, 145-146 (1936). Jurors need not be totally ignorant of the facts and issues involved, but must have the ability to set aside their opinions or impressions and

render a verdict based on the evidence developed at trial. *Irvin* v. *Dowd*, 366 U. S. 717, 722-723 (1961); *Turner* v. *Louisiana*, 379 U. S. 466, 472-473 (1965).

This Court is no stranger to the fact that racial prejudice may go undetected in jury deliberations, especially in capital sentencing proceedings. See *Turner* v. *Murray*, 476 U. S., at 35 (plurality opinion) ("[f]ear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty"). " 'It remains an unfortunate fact in our society that violent crimes perpetrated against members of other racial or ethnic groups often raise [a reasonable possibility that racial prejudice would influence the jury].' " *Id.*, at 35, n. 7 (quoting *Rosales-Lopez* v. *United States*, 451 U. S. 182, 192 (1981)). Upon being empaneled, jurors are instructed to leave their preconceived prejudices and opinions at home. In an ideal world, they are to walk into the jury box with an open mind and the wherewithal to listen to the evidence and facts presented. However, in all reality, it is unknown if that actually happens because "[j]uries provide no reasons, only verdicts." *Benally*, 546 F. 3d, at 1233.

The American jury decision-making process has been described as a "black box." *Ibid.* "[T]he inputs (evidence and argument) are carefully regulated by law and the output (the verdict) is publically announced, but the inner workings and deliberation of the jury are deliberately insulated from subsequent review." *Ibid.* If this Court were to delve into the inner workings of jury deliberations to determine if racial bias played a role in the verdict, the exception may end up swallowing the rule that has been firmly established for hundreds of years. The "black box" theory of jury decision making will cease to exist because this Court opened up Pandora's Box. Allowing jurors to impeach their own

verdict with testimony about alleged racial bias during deliberations may appear to create a small peek into the black box. However, over time that small peek will slowly open up even further with allegations of different types of alleged bias and eventually the black box will be blown wide open.

Trial by jury reflects the values and standards of the general public brought together for the sole purpose of deciding a peer's fate. If this Court allows litigants to peek into the jury deliberation room under the guise of determining whether bias played a role in the decision-making process, a juror's ability to be impartial may be quashed out of fear of public scrutiny. A jury's "black box" decision-making process and its independence from subjective overrule by the judiciary must be fiercely guarded. The consequences of abandoning the protections given to secret jury deliberations are too great.

CONCLUSION

The judgment of the Colorado Supreme Court should be affirmed.

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Respectfully submitted,

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